

**Dimo Ambulette Service, Inc. and Local 531, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 2-CA-16410**

March 17, 1981

**DECISION AND ORDER**

On July 25, 1980, Administrative Law Judge Julius Cohn issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> of the Administrative Law Judge and to adopt his recommended Order, as modified herein.<sup>3</sup>

**ORDER**

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Dimo Ambulette Service, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

<sup>1</sup> At sec. III, A, par. 11, of his Decision, the Administrative Law Judge inadvertently stated that union representatives visited the employer on April 24. The correct date of the visit is April 23, 1979.

We agree with the Administrative Law Judge, for the reasons expressed by him, that, from the entire situation, all essential elements of a valid demand by the Union have been made out in this proceeding and that Respondent's refusal to bargain therefore constituted a violation of Sec. 8(a)(5). See *Schreiber Freight Lines, Inc.*, 204 NLRB 1162, 1168-69 (1973).

<sup>2</sup> Member Zimmerman would not reach the question whether the discharge of Estrada constituted an independent violation of Sec. 8(a)(1).

<sup>3</sup> The Administrative Law Judge recommended that Respondent be ordered to cease and desist "in any like or related manner" from interfering with, restraining, or coercing its employees in the exercise of their Sec. 7 rights. On the authority of *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), we find that the issuance of a broad order is warranted in this case, since Respondent's unlawful conduct includes 7 discharges from an employee complement of 17; threats to close; actual close of business; and bypassing of the employees' designated collective-bargaining representative. See *Hansa Mold, Inc.*, 243 NLRB 853 (1979).

In its complaint, the General Counsel alleged that employee Markovich was denied immediate reinstatement after the lockout. Markovich testified at the hearing, and his status was fully litigated. However, the Administrative Law Judge inadvertently omitted Markovich's name from his recommended Order. We correct the omission and include Markovich among the employees to whom backpay is due.

It appears from evidence adduced at the hearing that employee Negron was also denied immediate reinstatement after the lockout. Although Negron was not alleged as a discriminatee in the complaint, his uncontradicted testimony established that he was not recalled to work for 3-4 weeks after Respondent reopened its business. Because Negron's status was fully litigated, we shall include him among the employees to whom backpay is due.

Member Jenkins would compute the interest due on backpay in accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

1. Substitute the following for paragraph 1(f):

"(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act."

2. Substitute the following for paragraph 2(a):

"(a) Offer Wilfredo Estrada, Alfredo Rosa, Pedro Foruria, Robert Johnson, John O'Neil, Anthony LaMacchia, Marcos Batista, Martin Markovich, and Jose Negron full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in that section of the Administrative Law Judge's Decision entitled 'The Remedy.'"

3. Substitute the attached notice for that of the Administrative Law Judge.

**APPENDIX**

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government**

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights. More specifically:

WE WILL NOT threaten employees with closure of our business if they select Local 531, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization, to represent them, or if they engage in other concerted activities regarding their working conditions or protesting the discharge of employees.

WE WILL NOT lock out employees because they selected the above-mentioned Union or

any other labor organization to represent them, or because they engage in concerted activities with respect to their working conditions.

WE WILL NOT bypass the designated collective-bargaining representative and union and deal directly with our employees regarding their conditions of employment.

WE WILL NOT refuse to recognize and bargain with Local 531, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees.

WE WILL NOT lay off, discharge, or otherwise discriminate against any employee because of that employee's union sympathies, or because that employee engaged in concerted protest concerning his working conditions and/or the discharge of other employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer full reinstatement to Wilfredo Estrada, Alfredo Rosa, Pedro Foruria, Robert Johnson, John O'Neil, Anthony LaMacchia, Martin Markovich, Jose Negron, and Marcos Batista, with backpay plus interest.

WE WILL, upon request, recognize and bargain with Local 531, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the exclusive representative of our employees in a unit of all full-time and regular part-time drivers and helpers, employed at our Bronx, New York, facility excluding office clerical employees, guards, and all supervisors as defined in the Act, with respect to wages, hours, and other terms and conditions of employment; and, if an understanding is reached, embody such understanding in a signed agreement.

DIMO AMBULETTE SERVICE, INC.

## DECISION

### STATEMENT OF THE CASE

JULIUS COHN, Administrative Law Judge: This case was heard before me in New York, New York, from November 26-29, 1979. Upon a charge filed April 25, 1979, by Local 531, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein called the Union, the Regional Director for Region 2 issued a complaint on May 31, 1979, alleging that Dimo Ambulette Service, Inc., herein called Respondent or the Company, violated Section 8(a)(1), (3), and (5) of the Act. Respondent filed an answer denying the commission of unfair labor practices.

The principal issues are whether Respondent violated Section 8(a)(1) and (3) of the Act by discharging Wilfredo Estrada because of the concerted activities in which he had engaged; whether Respondent then unlawfully discharged Alfredo Rosa because he engaged in a protest with other employees concerning Estrada's discharge; whether Respondent unlawfully discharged five other employees because they struck in protest of the discharges of both Estrada and Rosa; whether Respondent violated Section 8(a)(1) of the Act by threatening to close its business, by locking out employees, and by dealing directly with its employees; and finally, whether Respondent violated Section 8(a)(5) by refusing to recognize and bargain with the Union as the representative of a majority of its employees.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. The General Counsel and Respondent submitted briefs, which have been carefully considered.

Upon the entire record of this case, and from my observation of the witnesses and their demeanor, I make the following:

## FINDINGS OF FACT

### I. JURISDICTION

Respondent, a New York corporation, has a principal office and place of business in the Bronx, New York, where it is engaged in furnishing transportation to sick, disabled or handicapped people. Each year Respondent derives from its operations, gross revenues in excess of \$500,000, and purchases and receives goods and materials valued in excess of \$50,000 from other businesses within the State of New York, each of whom receives such goods and materials directly from points outside the State of New York. I find that Respondent is a company engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

### III. THE UNFAIR LABOR PRACTICES ALLEGED

#### A. Facts

Respondent operates ambulettes, really vans utilized to transport sick, infirm, or otherwise handicapped people, usually to and from homes and hospitals for treatment. During the period involved herein, Respondent employed 14 drivers, 2 helpers, and a dispatcher, Felix Dominguez, who also did some driving. The parties have agreed that these 17 employees were employed in an appropriate unit as of April 19, 1979.<sup>1</sup> Herman Ladenheim

<sup>1</sup> The complaint alleges, the answer admits, and I find that "All full-time and regular part-time drivers and helpers, employed by Respondent at its Bronx, New York, facility, excluding office clerical employees, guards, and all supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act."

is manager and Leonore Ladenheim, his wife, is president of Respondent, and together they run the operation.

Wilfredo Estrada was employed as a driver from March 1977 until April 20, 1979, except for one interval, and was discharged on the latter date. On April 13, Friday, and a payday, Estrada had a dispute with Ladenheim concerning a discrepancy in his pay. This involved a continuing question with regard to payment for a lunch period. Estrada normally worked during a span of 7 a.m. until 3:30 p.m., 8 hours of which one-half hour is deducted for lunch. However, there was no set time during which employees, who were driving the patients back and forth from hospitals, were able to stop for lunch. Ladenheim claimed that sometime during the midday, the drivers would find a period when they had nothing to do, and could stop for lunch. He also asserted that in any case there was so much downtime during the day that the subtraction of one half hour was really no loss to them.

However, on April 13, Estrada voiced his complaint that one day during the preceding week he had no opportunity for lunch, yet a half hour had indeed been deducted. Ladenheim consulted his records and agreed to pay Estrada an additional one-half hour pay to be included with his next paycheck. During the course of their argument, Estrada maintained that there were many occasions when he had no time to stop for lunch and Ladenheim replied that was the way it is. Estrada continued and said the employees were entitled to get a lunch period during the 8 hours if they were not being paid for the extra half hour. According to Estrada at one point, Ladenheim said it was nice knowing him, and asked why he did not quit. Estrada replied that he is not going to quit, why Ladenheim will not fire him. Finally, Ladenheim said that he better not try to take his lunch when there was something that he had to do.

As a result of this experience with Ladenheim, Estrada determined to organize the employees to join a union, a matter that had been the subject of discussion among them for some time previously. During the next week, Estrada arranged for a petition to be typed which stated that the signatures on it represented men working for Respondent who needed a union or a contract for better working conditions. This was done on April 17. The next day, April 18, Estrada asked an employee, Nazario, to sign it but he decided to wait until other employees signed first. On April 18, he also showed the petition to Ramon Cruz, his helper at a hospital, both of whom signed. The following day, April 19, Estrada completed work at 3:30 p.m. and remained in the area of Respondent's office, near the corner about 50 feet away. As the drivers came in and left the office, he obtained more signatures for his petition. This took approximately 2 hours during which nine other employees including Foruria, Batista, Rosa, LaMacchia, Quinones, Johnson, Markovich, and Negron also signed the petition. Estrada and other witnesses testified that during the time they remained near the office, the employees observed Ladenheim at times looking out to see them gathered at the corner. They also testified that Dominguez looked out from the office to observe them.

Before Estrada left work at 3:30 p.m. on April 19, Ladenheim told him to come in at 8 a.m. the following day, although Estrada's usual reporting time was 7 a.m. Ladenheim testified that he had done this in order to have an opportunity to talk to Estrada because Dominguez had complained to him about difficulty in communicating with Estrada during the day. On April 20, Estrada came in to work at 7 a.m. in any case. He immediately went inside and Ladenheim handed him his check and told him he was fired. Estrada asked why and Ladenheim replied that he was hostile, he did not obey orders, and a patient wrote a letter complaining about him. Estrada then went outside and met some of the men who were coming to work, including Batista, Robert Johnson, and Rosa. They asked what happened and he said that he had been fired. All of them then went inside, and Johnson asked Ladenheim why Estrada had been fired. Ladenheim said it was none of his business. Johnson said it is his business because Estrada is a friend and also an employee.

After Johnson stopped talking, Rosa asked Ladenheim why he fired Estrada and the reply was that it was none of his business. Rosa said he is an employee and has a right to find out what is going on. Ladenheim then said that he was fired too and handed him his check. Estrada and Johnson asked Ladenheim why he was firing Rosa, and Ladenheim replied that Rosa had done something to a patient. By this time everybody was talking, and at one point, Rosa told Ladenheim that he had not fired him for doing something to a patient but because he signed the petition for a union. Ladenheim made no reply to that.

The employees left the office and remained outside the door. Ladenheim followed and proceeded to ask each employee whether he was going to work as he had work for them. According to Ladenheim's testimony, he had given a work assignment to O'Neil while he was in the office, then asked him outside whether he was going to work, and O'Neil said he had to think. Ladenheim said that LaMacchia told him he felt sick, that Batista did not know what to say, and Foruria gave him a blank stare. Ladenheim went inside, came out again and told the employees that if they did not work he would consider them a voluntary quit. Apart from Estrada and Rosa who had just been discharged, Foruria, Batista, O'Neil, Johnson, and LaMacchia did not work. All the other employees, however, did work that day. During the discussion on the outside, according to the uncontradicted testimony of Estrada, Ladenheim said the guys were stupid for sticking up for Estrada, that Estrada was not going to pay their bills and he, Ladenheim, did not need the aggravation, and could close up and the guys would be out of a job.

Estrada then called the union office, informed them he had been fired and was told to come up. He went there with Foruria and LaMacchia, and they each signed authorization cards and were given cards for the other employees to sign. They broke up into two groups, visited the hospitals to find the other employees and obtained signed authorizations from 13 of the 17 employees in the unit. They then drove back to the union office and turned in the signed authorization cards.

The next day, April 21, Estrada, Foruria, and another employee met with two union representatives, deAngelis and Montanez, in front of Estrada's house, told them they had been fired and were informed that a union representative would be at Respondent's office on Monday morning.

In the meantime, Ladenheim had prepared letters to the five employees who had not worked on Friday, informing that he considered them to have voluntarily quit. However, on Monday, April 23, Foruria, Johnson, LaMacchia, and Batista reported for work. Ladenheim refused to send out Foruria and instead hand delivered the letter addressed to him, which had been dated April 21. The other three were sent out to work.

On April 24, about midday, the president of the Union, Charles Kranitz, accompanied by another union representative visited Respondent's office. Kranitz testified that he went into the office and presented his business card to Ladenheim who said he knew who he was. He told Ladenheim that he represented a majority of his employees and asked him for recognition. Ladenheim said that he did not care and he would speak to his lawyer first. Kranitz asked who the lawyer was and Ladenheim said it was none of his business and that he should go out. As he left, he told Ladenheim to do what he had to do and he would do what he had to do.

In the office at the time were both Ladenheims. They agreed that Kranitz had stated that he represented a majority of the men. However, there is little agreement on anything else that occurred. Ladenheim stated this was a very busy time of the day for him and he was on the telephone when Kranitz came in. He said he did not see any card, referring to Kranitz' business card, and did not get his name when Kranitz gave it. On the other hand, Leonore Ladenheim who was present said that two gentlemen walked in and threw a card on the desk. Though reluctant and evasive, Leonore Ladenheim indicated at two points in her testimony that her husband indeed looked at the card. Both Ladenheims stated that Ladenheim told Kranitz, in effect, that he was busy and could not see or talk to them. The Ladenheims denied that Kranitz mentioned a union, but also said he told his colleague, as they were leaving, something about getting out the picket signs and closing them down. This last is denied by Kranitz.

I credit the version of this short meeting, which lasted only 2 or 3 minutes, of Kranitz as the most likely to have occurred. As noted, I cannot credit Ladenheim's statement that he did not even see the business card or that he did not know who these people were. It should also be mentioned that Respondent went through another union organizational campaign 3 years before this one.

On April 24, Estrada and Johnson were at the office before 6 a.m. Shortly there after, two employees, Negron and Nazario, came to work. Estrada asked whether they intended to work, and Negron replied that they would unless a majority of the drivers did not work. Negron stated that he then went into the office and spoke to the Ladenheims. When asked if they were going to work, Negron said they had come to work but if the majority of the people were not going, they would not go. Negron testified that at this point Ladenheim said if

nobody is going to work, we will lock up and go home. Finally Negron said he told Ladenheim he would not take out the van and risk aggravating the other people about it. He then went outside and waited for the rest of the fellows to see what was going to happen. Nothing did happen, but at 6:30 a.m. Ladenheim locked up and left. Later, other employees came by, asked what happened and they told them the Ladenheims had locked up and had gone. Ladenheim stated he closed after talking to Negron because he was concerned about possible violence and harm to both the patients and the vehicles. However, I do not credit Ladenheim that his action in closing was based on the threat of violence. Leonore Ladenheim testified that Negron did not positively say he would not drive, and they never checked for sure as to whether Negron and Nazario would work. Nor is there any evidence of conduct indicating that violence was a possibility.

On the evening of April 24, Ladenheim was called by an employee, Leopoldi, who told him the drivers wanted to work. Ladenheim testified he asked Leopoldi for the names of those who wanted to work and instructed him to report this to Dominguez. The next day, April 25, Dominguez informed Ladenheim that he had some idea as to who wanted to work, and set up a meeting at a restaurant for Ladenheim and the drivers that morning. Negron stated that in the course of this meeting, he, himself, asked Ladenheim about hospitalization plans and Ladenheim replied that he had looked into this but it cost too much. Negron then proposed that the employees pay half, but Ladenheim still said no. LaMacchia testified that he arrived late for the meeting but heard Ladenheim say he was trying to do as much as he could for them but they were going about this the wrong way. Ladenheim acknowledged that the employees started talking about health plans and lunch hours but he told them he had not come to talk about these things but wanted to know who was going to work. However he did say that he was going to institute a system so that the employees would be sent out to work in seniority order.

On Wednesday and Thursday while the office was closed, a number of employees picketed with signs stating that Respondent was unfair. Ladenheim reopened on Thursday, April 26, and four senior drivers were put to work immediately that day as well as the next. Employees were gradually recalled as Ladenheim was able to regain some of his work. As for the employees who had refused to work on April 20, Ladenheim recalled Batista and LaMacchia on April 30. Of course, Foruria was never recalled as Ladenheim had delivered the letter terminating him as a voluntary quit.

Ladenheim also testified concerning the discharges of Estrada and Rosa. He said on April 19, Dominguez informed him he was having problems communicating with Estrada who had arrived late with a patient from Lincoln Hospital and was supposed to return but did not. Dominguez told him that Estrada did not respond to a signal. In addition, Ladenheim testified to having received a phone call late in the day on April 19 from a patient, Sarah Peaster, who reported about the manner in which Estrada handled her while taking her to the hospi-

tal. In essence, she complained that Estrada had frightened her while taking her downstairs in a wheelchair, indicating he was not trained to carry her in the chair and as a result, she was fearful. As April 19 was a Thursday, the night on which he normally worked up his payroll for the following day, Ladenheim said he discussed Estrada with his wife and they decided to fire him because of this and other complaints and the fact that he was not cooperative.

As for Rosa, Ladenheim indicated that since they were on the subject in their discussion of Estrada, they decided also to discharge Rosa at the same time because he too was a troublesome employee. Ladenheim also referred to an incident, which he believed occurred on March 19, in which Rosa did not respond to a call on the beeper. He also stated, after refreshing his recollection, that another incident with Rosa occurred on March 16 when he refused to go with a certain designated driver as a helper.

With regard to the delivery of the letter of termination to Foruria, on April 23, Ladenheim stated that over the weekend, he and his wife decided that if the employees who had refused to work on the preceding Friday returned that Monday, he would give work to Johnson, Batista, and LaMacchia as they were more senior employees. However, Foruria had only worked for less than 2 months and they were going to let him go, which they did.

## *B. Analysis and Conclusions*

### *1. The discharge of Wilfredo Estrada*

The General Counsel alleges that Wilfredo Estrada was discharged on April 20 because of his protests regarding lunchbreaks and because he circulated and obtained signatures on a petition for a union. It has been found that approximately a week before his discharge, Estrada questioned his paycheck in that it failed to provide pay for an additional half hour one day when he was unable to stop for lunch. As noted, Ladenheim consulted his records, found an error and agreed to pay Estrada for this in his next paycheck. This was the final incident in an ongoing dispute between Estrada and Ladenheim concerning Respondent's practice not to provide a set period for lunch resulting in employees having to stop on a catch-as-catch-can informal basis. Estrada's activity with regard to this subject is clearly protected as it involved wages and working conditions, obviously a matter affecting all employees and not merely Estrada himself. In her testimony before the State Unemployment Commission, Leonore Ladenheim conceded that Estrada's persistent efforts in this matter was one of the reasons why she and her husband decided to terminate him. Accordingly, I find by discharging Estrada because of his protest over Respondent's lunch policy and payroll policy with respect to lunch hours, Respondent thereby violated Section 8(a) (1) of the Act.<sup>2</sup>

<sup>2</sup> It is unnecessary to find, as suggested by the General Counsel, that Respondent violated Federal wage and hour statutes and regulations concerning overtime pay. It is sufficient that Estrada's activity was concerned with these matters.

It is uncontradicted that Estrada prepared a petition calling for union organization, and solicited signatures for the petition, particularly on Thursday, April 19 after work. Respondent denies that this played any part in its decision to discharge Estrada, claiming it had no knowledge of this activity on his part. However, this activity on the part of Estrada as well as the other employees who signed the petition, was carried on in the open on the street approximately 50 feet from the doorway of Respondent's premises. Credible evidence also establishes that during this time, a period of approximately several hours, employees returning from work and leaving the office went to the area where Estrada and others were standing and were observed by Ladenheim himself engaging in activity of this type. Ladenheim although denying that he was particularly observing the employees, nevertheless conceded that he probably stood up and looked out in order to stretch his legs. I find, based on the small plant doctrine,<sup>3</sup> that knowledge could be inferred to Respondent. Moreover, the testimony reveals that Dominguez, the dispatcher, although not a supervisor, was closely associated with Ladenheim, and he also left the office and looked to the point where Estrada and other employees were engaging in their activity. In addition, Dominguez actually spoke to one of the employees during this time. The knowledge of Dominguez and the relationship with his employer is further established by the fact that subsequently on Ladenheim's behalf, he arranged a meeting of employees during the time when Respondent had shut down its business. Thus, I find that Respondent had knowledge and was aware of Estrada's activity of circulating a petition and obtaining signatures in support of a union.

Respondent contends, however, that Estrada was fired, not because of the activities just discussed, but rather because of a complaint that it received from Sarah Peaster, a patient whom Estrada took to a hospital for treatment on April 19. Estrada was never warned in writing, or otherwise, concerning his work performance. Indeed employee LaMacchia testified without contradiction that although patients complained on three or four occasions about him, he was told by Ladenheim that he did not communicate either compliments or complaints to the drivers. The record further reveals that another employee, Markovich, received a written warning for misconduct and performance, and, thereafter, after another incident was discharged by letter. Of course this procedure was not followed in Estrada's case. Accordingly, Estrada's discharge was not pursuant to any established policy, and in view of his activity immediately preceding his termination, I find Respondent's assertion that he was discharged because of Peaster's complaint to be merely a pretext. I therefore conclude that Estrada was discharged in violation of Section 8(a)(1) and (3) of the Act because he circulated the petition for a Union.

### *2. The discharge of Alfredo Rosa*

On April 20, when Rosa, along with others, protested the discharge of Estrada, Ladenheim fired him on the

<sup>3</sup> *Wiese Plow Welding Co., Inc.*, 123 NLRB 616 (1959).

spot. Ladenheim first tried to explain this action, by stating that when he allegedly determined to discharge Estrada, he also decided to sever Rosa for general poor performance and lack of cooperation. When pressed at the hearing, Ladenheim referred to some incidents, the latest occurring in March 1979, in which Rosa supposedly failed to cooperate and was insubordinate. However, Ladenheim did not explain why Rosa was not disciplined during the period when three such instances occurred, rather than a month later while Rosa was engaged with others in protesting the discharge of a fellow employee. In view of the timing, I find that Rosa was engaged in protected concerted activity when he and other employees were protesting Estrada's discharge to Ladenheim, and therefore by terminating him at that moment, Respondent violated Section 8(a)(1) of the Act. As I have found that Estrada's discharge violated Section 8(a)(3) of the Act because of his preparation and circulation of a petition for a union and Respondent was aware of this conduct, the discharge of Rosa is found also to have been the result of union animus, and therefore violated Section 8(a)(3) of the Act.

### 3. The strikers

On the morning of April 20, immediately following the discharges of Estrada and Rosa, several other employees who had been protesting these actions by Respondent, refused to work. They were Johnson, O'Neil, LaMacchia, Batista, and Foruria who were standing outside the premises when Ladenheim came out and told them that he had work assignments for them, and unless they worked he considered them quits. When they continued to voice their protests, Ladenheim said they were discharged and that he considered them voluntary quits. By this conduct Respondent further violated Section 8(a)(1) of the Act as these fired employees were striking in protest of the illegal discharges of Estrada and Rosa. As such they were engaged in an unfair labor practice strike and their discharges violated Section 8(a)(1). The same conduct also constituted a violation of Section 8(a)(3) because it has been found that the discharge of Estrada, which they were protesting, was also motivated by Estrada's union activity.

### 4. The threat to close

In the course of the heated discussions among the employees and Ladenheim, while they were protesting the discharges, Ladenheim told the drivers that he did not need this aggravation and that he could close any time. This statement made in the midst of the protests together with union activity by these employees in signing the petition on the previous day constituted a threat to close the business in order to repress any or part of these activities, and consequently Respondent violated Section 8(a)(1) of the Act.

### 5. The lockout

On Monday, April 23, four of the five strikers whom Ladenheim discharged the preceding Friday reported to work. Ladenheim then assigned work to Johnson, LaMacchia, and Batista, thereby reinstating them. Howev-

er, he refused the same treatment to Foruria, but rather gave him a letter of discharge. The same day, Kranitz came to Respondent's office, and when he told Ladenheim that he represented a majority of his employees, as described above, Ladenheim refused to recognize or speak to him.

On the morning of April 24, when the Ladenheims opened the office they found that Johnson and Estrada were already in front. Then Negron and Nazario came to work and Ladenheim spoke to them asking if they were prepared to drive. Negron responded that he would work if a majority of the other drivers agreed to work. After hearing this, the Ladenheims decided to close the store and go home. They remained closed for 2 days. Respondent asserts it took this action for fear of violence to employees who would work and possibly to the customers, and damage to the vehicles and property. However, no evidence was presented of any conduct on the part of the strikers or other employees which would lead to this conclusion. The record reveals nothing but peaceful protests and some picketing. However, the real reason for closing the shop was described by Leonore Ladenheim in her testimony at the unemployment hearing, when she said that they locked up the shop because of the men who came in, threw a card on her husband's desk, and said they represented a majority of the men. Of course by this time, as noted, the employees had signed cards for the Union and Kranitz had visited the premises on the preceding day. Therefore by its own admission, Respondent locked out its employees because they joined the Union and because of the visit of the union representative, and thereby violated Section 8(a)(1) and (3) of the Act.

### 6. The meeting of April 25

After Respondent had locked out the employees it undertook to determine how many would be willing to return to work. For this purpose it enlisted Dominguez, the dispatcher, who communicated with a number of employees and was able to set up a meeting which took place at a cafe in the presence of the Ladenheims, the drivers, and helpers. In the course of that meeting, some of the employees inquired about health benefits and other conditions including the ever present issue of lunch hours and overtime. Ladenheim listened to some of the proposals, but would not grant any of these benefits indicating that the employees were going about it in the wrong way. However, he did announce that on the reopening of the business the following day, the employees would be sent out to work in seniority order and a complete seniority system would be maintained. I find that by conducting the meeting described above, listening to employee proposals concerning working conditions, instituting a seniority system, at a time when the Union had already advised Respondent that it represented a majority of the employees, Respondent had engaged in direct dealing with employees and bypassing of the Union, and thereby violated Section 8(a)(1) of the Act. As it appears that on the day of the demand for recognition, the Union did represent a majority of the employees, Respondent additionally violated Section 8(a)(5) of the Act.

### 7. The bargaining order

The parties are agreed, and I find, that all full-time and regular part-time drivers and helpers, employed by Respondent at its Bronx, New York, facility, excluding office clerical employees, guards and all supervisors as defined in the Act constitute an appropriate unit for the purposes of collective bargaining. Moreover, it is further agreed that there were a total of 17 employees in the unit as of April 20 and 23, 1979. Of this number 13 employees signed authorization cards for the Union, on April 20.

Respondent contends that despite the visit of the union representatives on April 23 to the office of Respondent, no actual demand for recognition or bargaining was made by them of the Ladenheims. However, while it is true that Kranitz, on behalf of the Union, perhaps did not use the exact words of demand, he did, and it is agreed, say that he represented a majority of the employees. At that point he was cut off by Ladenheim who refused to talk or discuss anything with him. In his testimony, Ladenheim sought to make it appear that he did not know who Kranitz was or what the import of his visit was. I do not credit his vague testimony as it is negated by the circumstances and other evidence. In this connection, I rely on Leonore Ladenheim's testimony referred to above, when she said that they decided to close the business on April 24 because of the visit of some union people. Moreover, the Ladenheims were not entirely neophytes in the labor relations area, as it appears that they successfully resisted unionization several years prior to the instant case. Accordingly, I find that the visit of the union representatives on April 23 and the events that occurred at that time constitute sufficient demand that the Union wanted recognition.

Having found that the Union represented a majority of Respondent's employees in an appropriate unit and having demanded recognition on April 23, there remains that question as to whether in the circumstances of the case, the Union is entitled to a bargaining order. In *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575 (1969), the United States Supreme Court held that a bargaining order would be appropriate in a situation where an employer engages in unfair labor practices which have a tendency to undermine majority strength and impede election processes. The Board has said that where a coercive atmosphere is created by the employer which conventional Board remedies may not adequately dissipate so that a fair election can be held with reasonable certainty, a bargaining order is warranted.<sup>4</sup>

In the instant case, it has been found that Respondent engaged in conduct violative of Section 8(a)(3) and (1) of the Act. The principal union protagonist, Estrada, who circulated a petition for a union, was unlawfully discharged immediately following such activity, along with another employee, Rosa. Immediately after these two discharges, Respondent discharged five other employees who were concertedly protesting the discharges of the other two. At this point Respondent had already terminated seven employees in the unit of seventeen. Al-

though Respondent reinstated three of these employees on April 23, the effects of their discharge on April 20 remained with the other employees. Noteworthy is that while reinstating three striking employees, Respondent refused reinstatement for Foruria and gave him a discharge letter. Thereafter, Respondent engaged in further violations of Section 8(a)(1) by indicating it would terminate its business rather than deal with the Union, by setting up a meeting and, in effect, bargaining with the employees and bypassing their designated collective-bargaining representative. I find this conduct to be quite pervasive, which tended to destroy and undermine the majority status of the Union, and rendered the conduct of a fair election very improbable. In such circumstances a bargaining order is warranted.<sup>5</sup>

In sum, I conclude that Respondent has violated Section 8(a)(5) of the Act by its refusal to recognize and bargain with the Union, and that a bargaining order is necessary.

### IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### V. THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent discharged Wilfred Estrada and Alfredo Rosa in violation of Section 8(a)(3) and (1) of the Act, I recommend that Respondent be ordered to reinstate them to their former positions or, if said positions are no longer available, to a substantially equivalent position, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of earning or other monetary loss they may have suffered as a result of the discrimination against them, less interim earnings, if any. The backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest to be computed in the manner described in *Florida Steel Corporation*, 231 NLRB 651 (1977).<sup>6</sup>

I have found that Foruria, Johnson, O'Neil, LaMacchia, and Batista engaged in a strike on April 20 to protest the discharges of Estrada and Rosa, and further that such strike constituted an unfair labor practice strike. As unlawfully discharged strikers, they are afforded the same remedial rights of other discharged employees, rather than those of ordinary strikers.<sup>7</sup> Therefore, the

<sup>4</sup> *Joseph J. Lachniet d/b/a Honda of Haslett*, 201 NLRB 855 (1973), enf'd. 490 F.2d 1382 (6th Cir. 1974).

<sup>5</sup> *Boston Pet Supply, Inc.*, 227 NLRB 1891 (1977).

<sup>6</sup> See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

<sup>7</sup> *Abilities and Goodwill, Inc.*, 241 NLRB 27 (1979).

remedy as described above, with respect to Estrada and Rosa, without the necessity of their making an unconditional offer to return to employment. This is clearly true as to Foruria who was doubly discharged, in a sense, when Ladenheim gave him a letter to that effect on April 23, and O'Neil who was never reinstated or offered reinstatement by Respondent. With respect to Johnson, LaMacchia, and Batista, these three employees were reinstated on Monday, April 23, when they reported and worked that day. However, they were unlawfully locked out on April 24 and 25, and because Respondent unlawfully instituted a seniority system, were not reinstated on April 26 when Respondent resumed its operations. Their status remains the same as any other employee discharged in violation of Section 8 (a)(3) and are entitled to the same remedy thereafter.

It is further recommended that Respondent be ordered to recognize and bargain with the Union as the exclusive collective-bargaining representative of a majority of Respondent's employees in the appropriate unit described above, as of April 23, 1979, the date on which Respondent unlawfully refused recognition of the Union.<sup>9</sup>

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by discharging Wilfredo Estrada because of the protected concerted activities in which he had engaged; and violated Section 8(a)(3) of the Act because, additionally, he was discharged for his union activities.

4. Respondent violated Section 8(a)(1) of the Act by discharging Rosa, Foruria, Johnson, O'Neil, LaMacchia, and Batista because they concertedly complained regarding the discharge of Estrada; and also violated Section 8(a)(3) of the Act by discharging those employees because of their union activities.

5. Respondent violated Section 8(a)(1) of the Act by threatening to close its business if the employees continued to complain about their wages, hours, and working conditions, and the discharge of Estrada.

6. Respondent violated Section 8(a)(1) and (3) of the Act by locking out its employees on April 24 and 25, because of their union activities.

7. Respondent violated Section 8(a)(5) and (1) of the Act by:

(a) Bypassing the designated collective-bargaining representative of its employees and dealing directly with those employees concerning their conditions of employment and seniority.

(b) Refusing, since April 23, 1979, to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the appropriate unit set forth above.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

#### ORDER<sup>9</sup>

The Respondent, Dima Ambulette Service, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because of those employees' protected concerted activities and their union activities.

(b) Threatening employees with closure of its business if the employees continue to concertedly complain regarding their working conditions, and protest the discharge of any employee.

(c) Locking out employees because of their support and activity for the Union.

(d) Bypassing the designated collective-bargaining representative of its employees and dealing directly with those employees concerning their seniority and other conditions of employment.

(e) Refusing to recognize and bargain with Local 531, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, as the collective-bargaining representative of the employees in the unit found appropriate above.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Offer Wilfredo Estrada, Alfredo Rosa, Pedro Foruria, Robert Johnson, John O'Neil, Anthony LaMacchia, and Marcos Batista full reinstatement to their former jobs or, if those jobs no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for their loss of earnings in the manner set forth in the section of the Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, time cards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Upon request, recognize and bargain with Local 531, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, in a unit of all full-time and regular part-time drivers and helpers, employed by Respondent at its Bronx, New York, facility, excluding office clerical employees, guards, and all supervisors as defined in Section 2 (11) of the Act, respecting rates of pay, wages, hours, or other terms and conditions.

<sup>9</sup> In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

<sup>8</sup> *Permanent Label Corporation*, 248 NLRB 118 (1980).

tions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(d) Post at its Bronx, New York, office copies of the attached notice marked "Appendix."<sup>10</sup> Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by its authorized repre-

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<sup>10</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sentative, shall be posted by it at its Bronx office immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.